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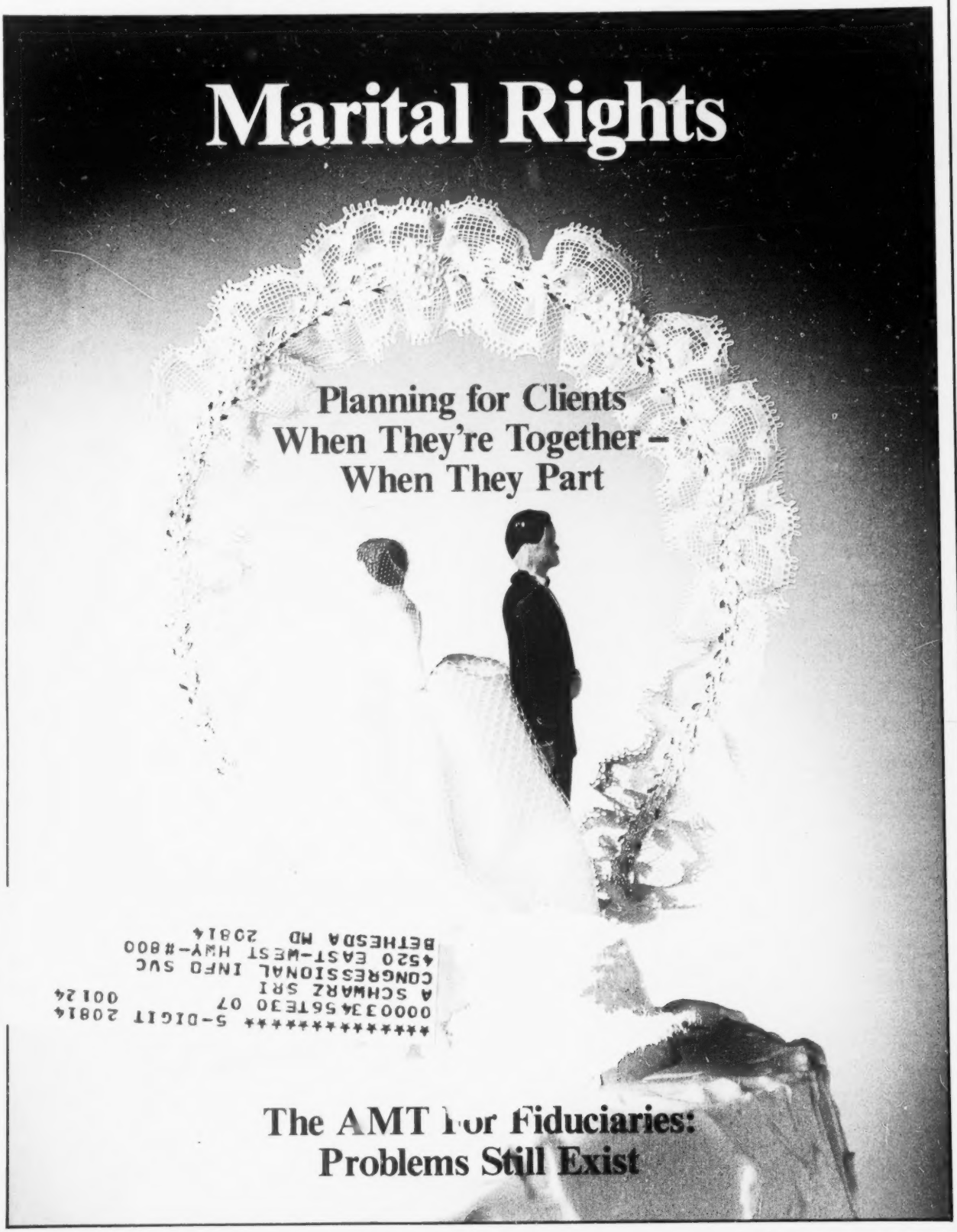
Marital Rights



Planning for Clients When They're Together – When They Part

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The AMT for Fiduciaries: Problems Still Exist

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Volume 129, No. 7 Estate Planning and Administration Since 1904 JULY 1990

MARITAL RIGHTS

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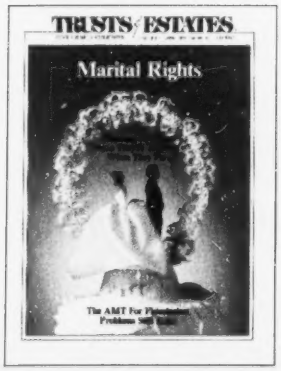

COVER

Effective planning must address all aspects of the marital scenario not only when a couple is together, but when divorce or death occurs. Photo by Jos. Palmieri, Dover, N.J.

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Commentary

Divorced Or Separated Clients Require Special Attention

It's a sad but true statement on life in the United States, but if your clientele reflects our society as a whole, it's a pretty safe bet that you can expect about half of your trusts and estates customers to come to you seeking some advise about their financial arrangements during a separation or divorce.

Protecting your client's assets and arranging a fair and equitable division of them is something that must be planned for early on, hence the proliferation of prenuptial and postnuptial agreements by not only wealthy but average clients.

This month we examine marital rights and some planning strategies that should be considered when divorce, death or a non-citizen spouse are factors in the planning equation.

Some strong reasons for prenuptial agreements are outlined by Sue Frunzi of Schulte, Roth & Zabel in New York. According to Ms. Frunzi, the advantages of prenuptial agreements are not limited to celebrity marriages and can provide certainty and protection to persons of lesser means as well as address issues which are not ordinarily considered in the context of many marriages, but which should be.

In their article, Howard and Martha Zaritsky of Zaritsky and Zaritsky in Fairfax, Vir. discuss the problems of the elective share. In the examination of this election, which may frustrate the deceased testator's best-laid estate plan, they consider the competing rights of the survivor in the deceased spouse's estate and the testator's desire to insulate his or her estate from the claims of the spouse.

Practical planning for the non-citizen spouse is the trust of the article by Henry Ziegler of Shearman & Sterling in New York. He discusses the considerable burden that has been placed upon the taxpayer family with a non-citizen spouse and the special problems associated with establishing a Qualified Domestic Trust. According to Mr. Ziegler, not every estate plan with a non-citizen spouse calls for QDT, but those that do require careful drafting and continued monitoring.

Also in this issue, Patrick Dorr of Oklahoma State University addresses ongoing problem with the Alternative Minimum Tax. □

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BPA

Law & Life Insurance

Many questions remain unanswered concerning the recent increase in the number of life insurance carrier insolvencies

By **BURKE A. CHRISTENSEN**
Vice President and General Counsel
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Bryn Mawr, Pa.

What is the liability of a life insurance producer to his client when the carrier becomes insolvent?[1] This has been largely an academic question for life agents, but a recent increase in the number of life insurance carrier insolvencies and a growing body of law which increases agent and broker liability to the insured has made it an issue of compelling current interest.

Consider Chart A which identifies the number of insolvencies involving multistate insurers which were recorded by the National Association of Insurance Commissioners. While there has been an increase in the rate of insolvencies for all carriers, the rate of increase in insolvencies among life and health carriers has been much higher than that of property casualty carriers.

According to Horn,[2] the precise number of insurer insolvencies in a given year is not always easy to determine. However, he concludes that from 1969 through 1986, there were at least 137 property-casualty carrier insolvencies. Fifty seven of these insolvencies occurred in 1984-1986. As Chart A indicates, there were at least 51 life and health carrier insolvencies, and 56 property/casualty carrier insolvencies, in the 40 months from January 1, 1987 to April 11, 1990.

Insurer insolvencies were the focus of a study by the U.S. House of Representatives Subcommittee on Oversight and Investigations. The Subcommittee's February, 1990 report, entitled "Failed Promises — Insurance Company Insolvencies," dealt primarily with property-casualty carriers, but concluded that the present state system for regulating the solvency of insurance companies is seriously deficient.

How do these insolvencies affect the producer? The general rule is that an agent cannot be held liable as a guarantor of the subsequent financial condition of the carriers he represents.[3] Agents are, nevertheless, required to use reasonable care in their business practices.[4] In fact, the Burkley-Bischoff article (cited in Footnote 1), concludes that an "agent therefore will be liable to the insured for losses due to carrier insolvency when he places a risk in a carrier which is insolvent, if the use of reasonable diligence would have revealed that fact." However, those authors indicate that the agent's duty of reasonable diligence "has been extended only to determining that the insurer is solvent at the time of placing insurance.

CHART A

Multi-State Carrier Insurance Insolvencies
1969-1990

	LIFE	P&C	TOTAL
1990 (1/1 to 4/11)	3	6	9
1989	27	16	43
1988	10	21	31
1987	11	13	24
1986	5	17	22
1985	2	21	23
1984	6	14	19
1983	11	4	15
1982	3	1	4
1981	0	3	3
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

Consequently, if a carrier becomes insolvent after the policy is issued, the subsequent insolvency does not impose liability on the agent.'"[5].

The relative importance to property-casualty producer's of determining a carrier's financial stability was revealed in a recent study of the insurer selection process.[6] A list of 17 potential factors was reviewed by a panel of insurance experts and reduced to the seven most important factors. The financial standing of the insurer was included in the short list.

What happens if the issuing carrier sells a block of business to a lower-rated carrier?

Upon a pre-study review by a panel of ten producers, the financial standing factor was dropped from the short list due to its consistently low evaluation by the respondents in the pretest. The factors which remained on the list related to product price, claims processing and service reputation, commissions and underwriting flexibility.

Perhaps the real question is not whether a carrier will become insolvent and leave insureds to sue their agents for the lost coverage. History clearly indicates that in the rare instance when a life insurer fails (only 27 in 1989 according to the NAIC, but as many as 41 according to other sources), the surviving companies will assume the guarantees promised by the failed carrier. In addition, the state guaranty funds or assessment systems are likely (but not guaranteed) to cover any remaining deficiencies.

But what is the result when a disappointed insured seeks compensation from the producer when the surviving carriers meet the guarantees but do not meet the projections of superior interest rate performance (for example) illustrated by the producer and the failed carrier? What happens if the issuing carrier sells a block of business to a lower-rated carrier? Does the insured have a right to the reputation and promised performance of the first carrier? The law has not yet provided answers to these questions. □

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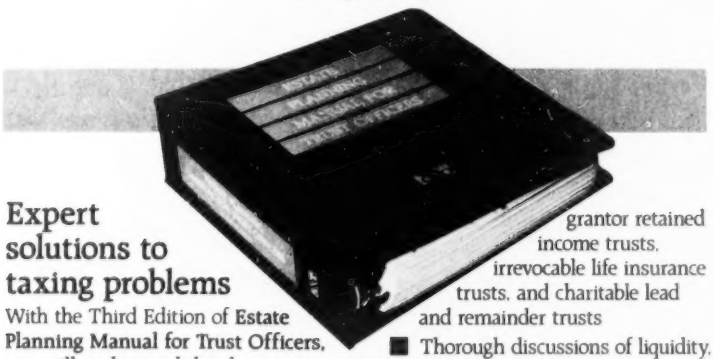

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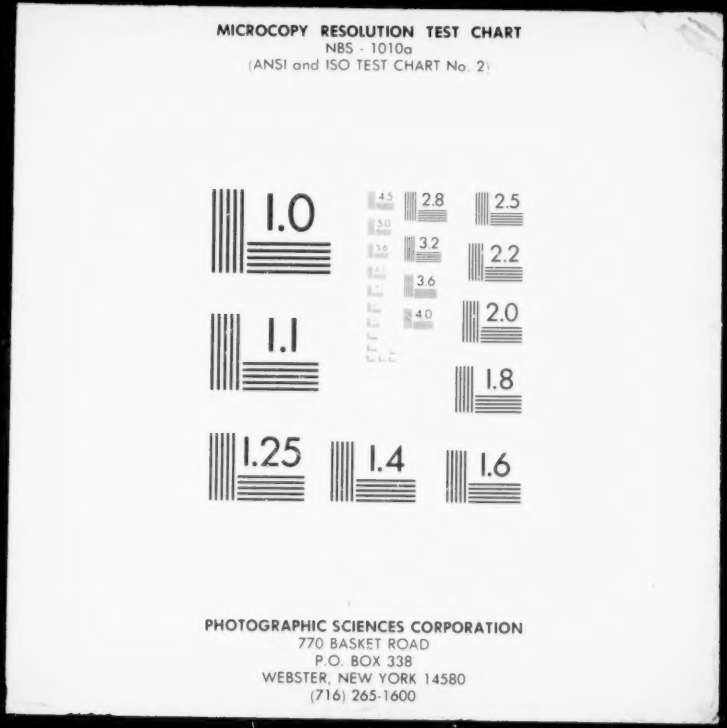
FOOTNOTES

1. For a full discussion of the insolvency problem, see Ronald C. Horn, Insurance Agents' and Brokers' Liability for Insurer Insolvencies, published in 1987 by the CPCU-Harry J. Loman Foundation; Nash, Diane M., "Special Problems for Agents/Brokers Resulting from Insurance Company Insolvency" published in 1989 by the Torts and Insurance Practice Section of the American Bar Association; and Diane E. Burkley, JD and Carol Ann Bischoff, JD, Liability of Agents, Brokers and Intermediaries for Insurer Insolvency.
2. See Horn, Op. Cit., p. 5.
3. See, for example, *Williams-Berryman Ins. Co., Inc. v. Morphis*, 249 Ark. 786, 461 S.W. 2d 577 (Ark. 1971) and *Beckman v. Edwards*. 59 Wash. 411, 110 P.6 (Wash. 1910).
4. See *Marshel Investments, Inc. v. Cohen*, 6 Kan. App. 2d 672, 634 P. 2d 133 (Kan. Ct. App. 1981) and *Kane Food Sales, Inc. v. Cruz*, 199 Ill. App. 2d 102, 255 N.E. 2d 90 (Ill. App. Ct. 1970).
5. See Burkley-Biscoff article (footnote 38) and substantial cases cited therein. P.344-345.
6. Hardigee, Donald W. and Howe, Vince, The Insurer Selection Process by Independent Insurance Agents, The Journal of Insurance Issues and Practices, page 27ff., January, 1990, Vol. XIII, No. 1.

Burke A. Christensen, J.D., CLU, is vice president and general counsel of the American Society of CLU and ChFC, Bryn Mawr, Pa. He also maintains a private law practice in Pennsylvania.



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